

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: COMPETITIVE BIDDING	DOCKET NO. RMU-01-8
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ORDER ADOPTING RULES

(Issued March 15, 2002)

Pursuant to the authority of Iowa Code §§ 17A.4, 476.1, and Iowa Code 476.53 (2001 Supp.), the Utilities Board adopts the rules attached hereto and incorporated by reference. The rules add new 199 IAC chapter 40 to reflect changes to Iowa Code chapter 476 that were enacted in House File 577; in particular, section 12 of House File 577. The reasons for adopting these rules are set forth in the attached notice of intended action.

IT IS THEREFORE ORDERED:

1. A rule making proceeding, identified as Docket No. RMU-01-8, is adopted.

2. The Executive Secretary is directed to submit for publication in the Iowa Administrative Bulletin a notice in the form attached to and incorporated by reference in this order.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 15th day of March, 2002.

UTILITIES DIVISION [199]

Adopted and Filed

Pursuant to Iowa Code sections 17A.4, 476.1, and 476.53 (2001 Supp.), the Utilities Board (Board) gives notice that on March 15, 2002, the Board issued an order in Docket No. RMU-01-8, In re: Competitive Bidding, "Order Adopting Rules." The Board is adopting a new chapter on competitive bidding to reflect changes to Iowa Code chapter 476 that were enacted in 2001 Iowa Acts, House File 577. In particular, Iowa Code section 476.53 (2001 Supp.) allows rate-regulated public utilities that file an application to construct or lease generating plants that meet certain criteria to request that the Board specify in advance, by order issued after a contested case proceeding, the rate-making principles that will apply when the costs of the facility are included in regulated electric rates. In making this determination, the Board is required to make two findings. The second finding is the subject of these adopted rules.

Iowa Code section 476.53(3)"c"(2) (2001 Supp.) requires the Board to make a finding that "[t]he rate-regulated utility has demonstrated to the board that the public utility has considered other sources for long-term electric supply and that the facility or lease is reasonable when compared to other feasible alternative sources of supply. The rate-regulated public utility may satisfy the requirements of this subparagraph through a competitive bidding process, under rules adopted by the board, that demonstrate the facility or lease is a reasonable alternative to meet its electric supply needs." The adopted rules establish a new chapter, 199 IAC chapter 40, for the

competitive bidding process. It is important to note at the offset that compliance with these rules is voluntary on the part of the public utility. The public utility may, at its option, demonstrate that it has considered other sources of supply and that its selection is reasonable without resorting to the competitive bidding process contained in these rules.

On August 3, 2001, the Board issued an order in Docket No. RMU-01-8 to consider adoption of 199 IAC chapter 40. Notice of Intended Action for the proposed rule making was published in IAB Vol. XXIV, No. 4 (8/22/01), p. 287, as **ARC 0888B**. Written comments were filed by MidAmerican Energy Company (MidAmerican), Alliant Energy (Alliant), Calpine, the Iowa Consumers Coalition (ICC), and the Consumer Advocate Division of the Department of Justice. An oral presentation was held on October 30, 2001.

The most significant change from the proposed chapter is the elimination of the requirement for demand-side and "all-source" solicitations. As pointed out by Alliant and MidAmerican in their comments, Iowa Code section 476.53 (2001 Supp.) does not require all-source or demand-side solicitations but, instead, requires only that utilities have in effect a Board-approved energy efficiency plan. The Board believes, at this time, energy efficiency and demand-side management can best be furthered by focusing on the utilities' energy efficiency plans rather than injecting energy efficiency into the supply resource solicitation process. Energy efficiency has played, and will continue to play, an important role in reducing the need for new supply over the long-term.

The Board has also deleted references in the chapter to "standard industry practice." Because no two states that address competitive bidding by rule have adopted similar bidding rules, no "standard industry practice" exists for regulatory-sanctioned competitive bidding processes. While MidAmerican urged the Board to adopt simplified rules that cite "standard industry practice," MidAmerican was unable to define the term at the oral presentation. (Oral presentation transcript (Tr.) p. 10).

Reference to undefined "standard industry practices" could compromise the "safe harbor" that the rules are intended to provide. The competitive bidding process is optional but is designed to be a "safe harbor" in that a utility following the competitive bidding process in the rules satisfies the requirements of Iowa Code section 476.53(3)"c"(2). If the rules simply referred to an undefined "standard industry practice," the bidding process would remain open to challenge even after the conclusion of a regulatory principles proceeding. (Tr. pp. 33-34). Compromise of the "safe harbor" concept could result in litigation that would needlessly delay the construction of generation.

The Board has changed the term "code of conduct" to "standards of conduct" and made minor changes to those rules. The Board emphasizes that 199 IAC 40.4(2)"a" is intended for a utility's direct communications with its affiliate and is not, for example, a requirement that a transcript of bid conferences be made. Also, 199 IAC 40.4(2)"i" is intended to apply only to the competitive process in these rules and not to other contractual relationships allowed under Iowa law. These clarifications are in response to comments made by Alliant and MidAmerican.

Alliant asked that utilities be allowed to recover the costs associated with the independent evaluator. The Board believes these rules are not the appropriate place to address cost recovery. However, it may be appropriate for a utility to seek recovery of these costs in a ratemaking principles proceeding, since the competitive bidding process adopted in new Chapter 40 is expressly designed to provide evidence for this proceeding.

The Board has retained the independent evaluator in the adopted rules, but the rules take a minimal approach to the role of the independent evaluator. In some states, the independent evaluator makes the actual bid selection or has a significant voice in the selection process. In these rules, the role of the independent evaluator is to oversee the process, not the selection.

It is important to note that an independent evaluator is only used if three choices are made by the utility or its affiliate. First, the utility chooses to seek a determination of regulatory treatment for a new plant in a ratemaking principles proceeding. Second, the utility chooses to use the competitive bidding process set forth in the rules to establish in the ratemaking principles proceeding that its proposed plant is reasonable compared to other feasible alternatives. Third, and most significant, the public utility's affiliate chooses to participate in the competitive bidding process. Unless all three choices are made, an independent evaluator is not required.

While merchant plant developers such as Calpine argue that the independent evaluator should play a more significant role in the process, the role the Board has

assigned the evaluator is appropriate because under House File 577 (Iowa Code section 476.53 (2001 Supp.)) the outcome of the competitive bidding process is not binding on the utility, but, at the option of the utility, is used as evidence in a ratemaking principles proceeding. When a public utility affiliate is involved in the bidding process, use of an independent evaluator provides other bidders some comfort that the process is fair and that all bidders are subject to the same processes and procedures. Even though the competitive bidding process is limited to ratemaking principals proceedings, an unfair bidding process can result in higher electricity rates for Iowa's homes, businesses, and industries.

In response to comments filed by the ICC, the Board has increased the time to respond in 199 IAC 40.2(1)"d" and 40.4(3)"a"(2) from 15 to 20 days. In setting these time periods, the Board is attempting to balance the need to evaluate the information with the need to move the bidding process forward as quickly as possible.

Two additional points require clarification. First, utilities may seek confidential treatment under 199 IAC 1.9(6) for their build or lease cost estimates required by 199 IAC 40.3. Second, the adopted rules do not require that utilities conduct transmission studies before issuing their request for proposals.

The changes to the noticed rules are in response to the comments or minor changes such that no additional notice is required. There is no specific waiver provision in the adopted chapter but the Board's general waiver provision in 199 IAC 1.3 would apply.

This chapter will become effective on May 8, 2002.

These rules are intended to implement Iowa Code section 476.1 and Iowa Code section 476.53 (2001 Supp.).

The following chapter is adopted.

Adopt new 199 IAC 40, as follows:

CHAPTER 40

COMPETITIVE BIDDING PROCESS

199—40.1(476) General information.

40.1(1) Definitions. The following words and terms when used in these rules will have the meaning indicated below:

"Affiliate" means a party that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with a rate-regulated public utility.

"Arm's-length transaction" means a standard of conduct under which unrelated parties, each acting in its own best interest, would carry out a particular transaction. Applied to related parties, a transaction is at arm's length if the transaction could have been made on the same terms to a disinterested third party in a bargained transaction where each party has substantially the same bargaining power.

"Control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of an enterprise through ownership, by contract or otherwise.

"RFP" means request for proposals.

"Supply-side resource" means a resource that can provide electrical energy or capacity to the utility. Supply-side resources include utility-owned generating facilities, and energy or capacity purchased from other utilities and nonutilities. Supply-side resources include modifications to existing generating facilities.

"Utility" as defined in this chapter refers to a rate-regulated electric public utility selling to retail customers in Iowa.

40.1(2) *Applicability and purpose.* The rules apply to any rate-regulated electric public utility choosing to establish a competitive bidding process under Iowa Code section 476.53(3)"c"(2). The rules establish minimum requirements for bidding processes used to purchase supply. Under these rules, bids compete not only with other bids but also with the utility's own build or lease options. Utilities maintain the right to secure or free up electric capacity and energy through means other than a competitive bidding process.

40.1(3) *General guidelines for resource acquisition.* The utility, as part of any solicitation under its competitive bidding process, will provide estimates of the cost the utility would incur in building or leasing the desired resource consistent with the requirements of 199 IAC 40.3(476).

40.1(4) *Waivers.* The utility may file for a waiver of any or all of these bidding process requirements. In making a decision regarding the granting of a waiver, the board shall consider, among other things, whether the utility is investor-owned, the timing of the solicitation, requirements of other regulatory bodies having jurisdiction

over the utility, and whether or not an affiliate of the utility is considering bidding on the project.

199—40.2(476) Competitive resource acquisition procedure.

40.2(1) Procedures. The utility shall use the following procedures to competitively acquire supply-side resources under its competitive bidding process. If an affiliate of the utility plans to submit bids for supply-side resources it will own or operate, it shall additionally adhere to the procedures specified in 199 IAC 40.4(476).

a. If a utility determines that it has a need for additional supply-side resources, it shall make a general public announcement indicating its needs and intentions. If an affiliate of the utility decides to bid once a request for proposal is announced, it will alert the manager at the public utility responsible for the request for proposal and bid process of its intention.

b. The utility shall provide a statement to the board indicating whether an affiliate of the utility desires, in the competitive resource acquisition process, to submit bids for supply-side resources it will own or operate.

c. If an affiliate of the utility desires to submit bids for supply-side resources, the utility shall select an independent evaluator from the board-approved list of evaluators to perform the functions specified in 199 IAC 40.4(3). The name of the independent evaluator selected for this project shall be filed with the statement to the board required in 199 IAC 40.2(1)"b." The utility shall provide the estimated cost

to utilize the services of the independent evaluator as part of its statement. The independent evaluator shall be paid by the utility.

d. If a board-approved list of independent evaluators has not been established under 199 IAC 40.4(3) at the time of the proposed solicitation, the utility shall file a short list of names with the board with qualifications and potential conflicts of interest as part of its statement required in 199 IAC 40.2(1)"b." Interested parties and the board shall have 20 days to object to any names on the short list. Absent objection, the utility may proceed with any independent evaluator identified on the list. With objection, the board shall review the evaluators on the list and remove any names that it deems are not independent of the utility or the bidding process, or not qualified to perform the functions of the independent evaluator as identified in 199 IAC 40.4(3). Any board decision to remove names from the list will be issued within 15 days after the end of the objection period. If the board determines none of the persons listed are sufficiently independent or qualified to perform the functions of the independent evaluator, the process will begin again with a new list from the utility.

e. The utility shall publish and circulate an RFP that complies with the requirements of 199 IAC 40.5(476). The utility shall make the RFP readily available to interested persons by conspicuously posting the request on its Internet site or other public electronic bulletin board. The RFP shall be filed with the project's independent evaluator if one is required.

f. Within 30 days after publication of the RFP, the utility shall convene a bid conference open to all potential bidders. The bid conference shall be held no less than 20 days after it is noticed. At the bid conference, the utility shall answer questions posed by bidders concerning the RFP. Bidders may request and the utility may hold more than one bid conference if needed. However, in no event shall a bid conference be scheduled later than 30 days beyond the issuance of the RFP. The independent evaluator, if required pursuant to 199 IAC 40.4(3), shall attend the bid conference.

g. At the conclusion of the bid conference(s), the utility shall publish and circulate the date for submission of sealed bids. That date shall be no earlier than 30 days following the last bid conference.

h. The utility shall file its build or lease cost estimates required by 199 IAC 40.3(476) with the board seven days prior to the deadline for other bidders.

i. If an affiliate of the utility desires to submit a bid for supply-side resources it will own or operate, it shall submit its bid to the independent evaluator, the board, and the utility one day prior to the deadline for other bidders.

j. After the close of the deadline for the submission of bids, the utility shall commence a review to determine whether the bids are responsive to the minimum bid evaluation criteria specified in the RFP. All responsive bids shall be evaluated in accordance with the bid evaluation criteria specified in the RFP.

k. Upon completing its evaluation, the utility shall file with the board a short list of bidders whose bids the utility deems are most reasonable in meeting the resource

needs of the utility. The utility's filing of its short-list selection shall include a report that is sufficiently detailed and rigorous to support those selections, including an evaluation of all bids received and an explanation for why any bidders were excluded from the short list. The utility shall provide copies of the report to all bidders and other interested parties.

l. If an independent evaluator was required as part of the solicitation, the independent evaluator shall submit its certification of the fairness of the bidding process at the same time the utility submits its short list to the board.

m. Upon filing of the short list selection and certification from the independent evaluator, if required pursuant to 199 IAC 40.4(3), interested parties shall have 15 days to file a complaint alleging that a bidder was excluded from the short list due to unfair treatment, significant errors in the selection process, or other similar reasons.

n. Absent complaints regarding the short-list selection, the utility may select a resource provider from the short list, choose the utility-build or lease option, or combine both options to meet its resource needs, whichever the utility deems most reasonable. Final selection and contract negotiations reside solely with the utility.

40.2(2) Evaluation of bids. The evaluation of bids submitted in a competitive bidding process must be based on the criteria identified in the utility's request for proposal. Bids should compete not only with other bids but also with the utility's own build or lease options, including plant life extensions, upgrades, and modifications.

40.2(3) Contract negotiations. The utility shall negotiate all contracts. A utility may negotiate a pricing structure that is suitable for the resource, considering such factors as the reliability of the resource, need for security of performance, the availability of other means of ensuring security of performance, the nature of the resource, the level of risk, and other appropriate factors. The utility shall negotiate contract terms that appropriately allocate the risks of future fuel costs and other resource costs between the resource provider and the utility.

40.2(4) *Utility reporting.* The utility conducting a bid solicitation under its competitive bidding process shall submit a written report to the board within 45 days of completion of its evaluation of bids. This report shall describe in detail the evaluation of bids and the utility's comparison of the bids received to its own utility-build or lease options. The report shall also include a copy of the utility's RFP, a detailed description of the utility's bid evaluation and selection process, and copies of all bids submitted to the utility in its bid solicitation.

199—40.3(476) Utility-build or lease cost estimates.

40.3(1) General requirements. A utility conducting a bidding process shall develop detailed cost estimates of its own build or lease options. Those options may include units jointly planned with other companies, plant upgrades or modifications, and plant extensions. The cost estimates shall be detailed and filed on both a project and per-unit basis.

40.3(2) Project cost estimates. Project cost estimates shall be current and based on the prices likely to be actually quoted by manufacturers and vendors of

power plant equipment. The utility-build or lease option shall be structured on an incremental cost basis, including an allocation of common costs incurred for the project's development. The utility shall detail in its filing the cost allocations and methodologies used for overhead costs and any joint facilities used in its estimates.

40.3(3) *Per-unit cost estimates.* The utility shall file estimates of per-unit costs in the same measurements or units expected from other bidders on the project sufficient for the board to determine the relative costs of the utility-build or lease option versus like bids received from other bidders. The per-unit cost estimates shall clearly identify the rate-making principles used in calculating these costs.

40.3(4) *Filing requirements.* The utility-build or lease cost estimates shall be submitted to the board seven days prior to the utility's receiving competitive bids for new electric capacity and energy.

199—40.4(476) Utility affiliate bids.

40.4(1) *General requirements.* Any bid prepared by an affiliate of the utility shall comply with the selection criteria specified in the RFP(s) and with board rules governing affiliate transactions (199 IAC 31). The utility may not give preferential treatment or consideration to a bid prepared by an affiliate of the utility. To ensure a level playing field for all bidders, the utility shall comply with its standards of conduct as required by 199 IAC 40.4(2) and shall hire an independent evaluator to ensure compliance with the standards of conduct prior to the drafting of the RFP's.

40.4(2) *Standards of conduct.* Each utility must establish standards of conduct to ensure that all transactions between the utility and its affiliates are conducted on

an arm's-length basis. The utility's standards of conduct shall be filed with the board prior to any solicitation under the utility's competitive bidding process. At a minimum, the utility's standards of conduct shall include the following:

a. The utility shall maintain full written records and notes of all communications between the utility and the bidding affiliate and between the utility and the independent evaluator, as well as all other bid-related communications.

b. The utility shall ensure that the bidding affiliate has access only to the same bidding information at the same time as other bidders.

c. The utility's RFP and evaluation team shall not share with the bidding affiliate any information regarding the request for proposals, standard contract, drafts of either document, information contained in those documents, or any information about the preparation of those documents unless and until such information is available to all other bidders in the solicitation.

d. The utility shall establish a single point of contact for each RFP and bidding process for all questions about bids and evaluations.

e. The utility shall keep in a secure location all requests for proposals and contract drafts, related bid documents, any analyses, notes, communications, evaluations and any other written material concerning the RFP, standard contracts, proposals, and all other documents related to the bidding process.

f. The utility's evaluation team members shall brief management regarding confidential information about the bidding process only on a need-to-know basis. Such briefings will not occur in general staff meetings or other group meetings.

g. The utility will make all pertinent employees aware of its procedures that must be followed between the public utility and the bidding public utility affiliate or division for confidentiality of RFPs, standard contracts, and other documents pertinent to the bidding process.

h. The utility shall not share resources with an affiliate bidder unless such resources are also made available to other bidders.

i. The utility shall not contract for the provision of services and equipment on behalf of an affiliate bidder that are not available to other bidders.

j. The utility shall not withhold information about Clean Air Act emissions allowances from potential bidders to circumvent or hinder the competitive bidding process.

k. Employees of any bidding affiliate are prohibited from participating in the evaluation process.

40.4(3) *Independent evaluator.* The utility shall use an independent evaluator if there is a likelihood that an affiliate's bid may be included among the bids to be evaluated. The utility shall maintain a written record of communications and contacts with the independent evaluator.

a. Short list of approved independent evaluators. A board-approved list of independent evaluators shall be compiled using the following process:

(1) The utility shall file with the board a list with qualifications of at least five independent evaluators it deems to be appropriate in auditing the bidding and selection process under its competitive bidding process. The utility shall reveal each

listed evaluator's associations with the utility or any of its affiliates, divisions, or subsidiaries that could create a potential conflict of interest.

(2) Upon the utility's filing of the list, any interested party shall have 20 days to object to either the independence or the qualifications of one or more evaluators included on the list.

(3) After the time of objection has passed, the board shall approve a final list of potential evaluators that it deems to be independent and qualified to perform the functions of the independent evaluator as specified in 199 IAC 40.4(3)"b."

b. Functions of the independent evaluator. The functions of the independent evaluator shall include the following:

(1) Determine whether the utility complied with its standards of conduct as required by 199 IAC 40.4(2).

(2) Determine whether the utility's RFP complies with the minimum requirements specified in 199 IAC 40.5(476).

(3) Determine whether the utility treated and considered its affiliate's bid in the same manner it treated and considered other bids intended to meet the same resource needs.

(4) Determine if the transaction provides the utility's affiliate any unfair competitive advantage by virtue of its affiliation or association with the utility.

(5) Certify with the board at the time the utility files its short list of potential providers that the process was fair and complied with the utility's standards of conduct as required by 199 IAC 40.4(2).

(6) Any other determinations or certifications the evaluator deems relevant.

199—40.5(476) Request for proposals (RFP). The request for proposals shall clearly set forth the eligibility and evaluation criteria and shall specify the weight to be given to any price or nonprice selection criteria.

40.5(1) Minimum evaluation criteria. The price and nonprice factors selected for evaluation and the weightings attached to each can reasonably vary from utility to utility and project to project. However, the following factors shall be considered for each supply-side project solicitation:

- a. Level and schedule of required capacity and energy payments;
- b. Status of project development;
- c. System fuel diversity;
- d. Reliability and performance measures;
- e. Firm versus variable or indexed pricing;
- f. Dispatchability;
- g. Project location and effect on the transmission grid;
- h. Use of Iowa fuels, manpower, and other state resources;
- i. Benefits to be derived by the industries and communities associated with a particular project;
- j. Demonstrated financial viability of the project and the developer;
- k. Developer's prior experience in the field.

40.5(2) *Contents of the request for proposals.* The RFP shall contain sufficient information to apprise potential bidders of the utility's criteria for evaluation of bids

received as part of the competitive resource acquisition process specified in 199 IAC 40.2(476). This information shall include the bid evaluation criteria, including the weights to be assigned to each criterion, that the utility plans to use in ranking the bids received. Specific information associated with the bid evaluation criteria provided by the utility shall include, but not be limited to, the following:

- a. Preferred fuel types;
- b. The extent to which additional supply-side resources must be located in certain geographic areas due to transmission constraints, local load condition, permitting constraints, or other factors;
- c. Important transmission constraints on the utility's system and on adjoining utility systems, and reasonable estimates of transmission costs for supply-side resources located in different areas;
- d. The extent and degree to which supply-side resources must be dispatchable, including the requirement, if any, that supply-side resources be able to operate under automatic dispatch control;
- e. Supply-side resource reliability requirements and objectives, and the method(s) that will be used to measure the achievement of those requirements and objectives, including the contribution of individual supply-side resources;
- f. The desirability of firm pricing and contract terms of various durations;
- g. The minimum bid evaluation criteria that must be met by a bidder for a bid to be considered responsive to the RFP. The utility shall be reasonable in its

specification of minimum bid evaluation criteria and shall not artificially limit the pool of bidders through unreasonable or excessively restrictive minimum criteria;

h. The utility's proposed standard contract for the acquisition of supply-side resources.

199—40.6(476) Complaints. The board shall resolve disputes between a utility and a bidder that may arise as a result of implementation of the bidding process. The independent evaluator shall participate by providing information on the bidding process including the selection of the winning bid. A complaint by a bidder concerning the utility's decisions on the acquisition of resources in a solicitation must be filed within 15 days of the filing of the short-list selection with the board.

These rules are intended to implement Iowa Code section 476.1 and Iowa Code Section 476.53 (2001 Supp.)

March 15, 2002

/s/ Diane Munns
Diane Munns
Chairperson